

AMENDED IN ASSEMBLY APRIL 5, 2010

CALIFORNIA LEGISLATURE—2009–10 REGULAR SESSION

ASSEMBLY BILL

No. 2355

Introduced by Assembly Member Smyth

February 19, 2010

An act to amend Section 14661 of the Government Code, and to repeal Section 4 of Chapter 252 of the Statutes of 1998, relating to public works.

LEGISLATIVE COUNSEL'S DIGEST

AB 2355, as amended, Smyth. Public works: design-build.

Existing law authorizes the Director of General Services, when authorized by the Legislature to use the design-build procurement process for a specific project, to contract and procure state office facilities, other buildings, structures, and related facilities, as provided.

This bill would require the Department of General Services to submit to the Joint Legislative Budget Committee, by January 1, 2015, a report containing a description of each public works project procured through the design-build process that is completed after January 1, 2010, and before December 1, 2014. *The requirement for submitting a report would become inoperative on January 1, 2019, in accordance with other specified provisions.*

~~Existing law establishes that specified provisions relating to state design-build projects shall only remain operative until the completion of at least 5 design-build projects, each with a value of \$10,000,000 or more, or until January 1, 2006, whichever occurs later~~ *authorizes the Director of General Services to enter into only 7 design-build contracts pursuant to specified provisions, and requires 2 of these 7 to be for new veterans' homes in Fresno and Shasta counties, as prescribed.*

This bill would repeal that provision. *The bill would also set forth its intent not to void or terminate design-build contracts already executed by the Department of General Services prior to the effective date of the bill.*

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 14661 of the Government Code is
2 amended to read:
3 14661. (a) For the purposes of this section, the definitions in
4 subdivision (a) of Section 13332.19 shall apply.
5 (b) Notwithstanding any provision of the Public Contract Code
6 or any other provision of law, when the Legislature authorizes the
7 use of the design-build construction procurement process for a
8 specific project, the Director of General Services may contract and
9 procure state office facilities and other buildings, structures, and
10 related facilities pursuant to this section.
11 (c) Prior to contracting with a design-build entity for the
12 procurement of state office facilities and other state buildings and
13 structures, the director shall:
14 (1) Prepare a program setting forth the performance criteria for
15 the design-build project. The performance criteria shall be prepared
16 by a design professional duly licensed and registered in the State
17 of California.
18 (2) (A) Establish a competitive prequalification and selection
19 process for design-build entities, including any subcontractors
20 listed at the time of bid, that clearly specifies the prequalification
21 criteria, and states the manner in which the winning design-build
22 entity will be selected.
23 (B) Prequalification shall be limited to consideration of all of
24 the following criteria:
25 (i) Possession of all required licenses, registration, and
26 credentials in good standing that are required to design and
27 construct the project.
28 (ii) Submission of evidence that establishes that the design-build
29 entity members have completed, or demonstrated the capability
30 to complete, projects of similar size, scope, or complexity, and
31 that proposed key personnel have sufficient experience and training

1 to competently manage and complete the design and construction
2 of the project.

3 (iii) Submission of a proposed project management plan that
4 establishes that the design-build entity has the experience,
5 competence, and capacity needed to effectively complete the
6 project.

7 (iv) Submission of evidence that establishes that the design-build
8 entity has the capacity to obtain all required payment and
9 performance bonding, liability insurance, and errors and omissions
10 insurance, as well as a financial statement that assures the
11 department that the design-build entity has the capacity to complete
12 the project.

13 (v) Provision of a declaration certifying that applying members
14 of the design-build entity have not had a surety company finish
15 work on any project within the last five years.

16 (vi) Provision of information and a declaration providing detail
17 concerning all of the following:

18 (I) Any construction or design claim or litigation totaling more
19 than five hundred thousand dollars (\$500,000) or 5 percent of the
20 annual value of work performed, whichever is less, settled against
21 any member of the design-build entity over the last five years.

22 (II) Serious violations of the Occupational Safety and Health
23 Act, as provided in Part 1 (commencing with Section 6300) of
24 Division 5 of the Labor Code, settled against any member of the
25 design-build entity.

26 (III) Violations of federal or state law, including, but not limited
27 to, those laws governing the payment of wages, benefits, or
28 personal income tax withholding, or of Federal Insurance
29 Contributions Act (FICA) withholding requirements, state disability
30 insurance withholding, or unemployment insurance payment
31 requirements, settled against any member of the design-build entity
32 over the last five years. For the purposes of this subclause, only
33 violations by a design-build member as an employer shall be
34 deemed applicable, unless it is shown that the design-build entity
35 member, in his or her capacity as an employer, had knowledge of
36 his or her subcontractor's violations or failed to comply with the
37 conditions set forth in subdivision (b) of Section 1775 of the Labor
38 Code.

39 (IV) Information required by Section 10162 of the Public
40 Contract Code.

1 (V) Violations of the Contractors' State License Law (Chapter
2 9 (commencing with Section 7000) of Division 3 of the Business
3 and Professions Code), excluding alleged violations or complaints.

4 (VI) Any conviction of any member of the design-build entity
5 of submitting a false or fraudulent claim to a public agency over
6 the last five years.

7 (vii) Provision of a declaration that the design-build entity will
8 comply with all other provisions of law applicable to the project,
9 including, but not limited to, the requirements of Chapter 1
10 (commencing with Section 1720) of Part 7 of Division 2 of the
11 Labor Code.

12 (C) The director, when requested by the design-build entity,
13 shall hold in confidence any information required by clauses (i)
14 to (vi), inclusive.

15 (D) Any declaration required under subparagraph (B) shall state
16 that reasonable diligence has been used in its preparation and that
17 it is true and complete to the best of the signer's knowledge. A
18 person who certifies as true any material matter that he or she
19 knows to be false is guilty of a misdemeanor and shall be punished
20 by not more than one year in a county jail, by a fine of not more
21 than five thousand dollars (\$5,000), or by both the fine and
22 imprisonment.

23 (3) (A) Determine, as he or she deems in the best interests of
24 the state, which of the following methods listed in subparagraph
25 (B) will be used as the process for the winning design-build entity.
26 The director shall provide a notification to the State Public Works
27 Board, regarding the method selected for determining the winning
28 design-build entity, at least 30 days prior to publicizing the
29 design-build solicitation package.

30 (B) The director shall make his or her determination by choosing
31 one of the following methods:

32 (i) A design-build competition based upon performance, price,
33 and other criteria set forth by the department in the design-build
34 solicitation package. The department shall establish technical
35 criteria and methodology, including price, to evaluate proposals
36 and shall describe the criteria and methodology in the design-build
37 solicitation package. Award shall be made to the design-build
38 entity whose proposal is judged as providing the best value in
39 meeting the interest of the department and meeting the objectives
40 of the project. A project with an approved budget of ten million

1 dollars (\$10,000,000) or more may be awarded pursuant to this
2 clause.

3 (ii) A design-build competition based upon performance and
4 other criteria set forth by the department in the design-build
5 solicitation package. Criteria used in this evaluation of proposals
6 may include, but need not be limited to, items such as proposed
7 design approach, life-cycle costs, project features, and functions.
8 However, any criteria and methods used to evaluate proposals shall
9 be limited to those contained in the design-build solicitation
10 package. Award shall be made to the design-build entity whose
11 proposal is judged as providing the best value, for the lowest price,
12 meeting the interests of the department and meeting the objectives
13 of the project. A project with an approved budget of ten million
14 dollars (\$10,000,000) or more may be awarded pursuant to this
15 clause.

16 (iii) A design-build competition based upon program
17 requirements and a detailed scope of work, including any
18 performance criteria and concept drawings set forth by the
19 department in the design-build solicitation package. Award shall
20 be made on the basis of the lowest responsible bid. A project with
21 an approved budget of two hundred fifty thousand dollars
22 (\$250,000) or more may be awarded pursuant to this clause.

23 (4) For the purposes of this subdivision, the following definitions
24 shall apply:

25 (A) "Best interest of the state" means a design-build process
26 that is projected by the director to reduce the project delivery
27 schedule and total cost of a project while maintaining a high level
28 of quality workmanship and materials, when compared to the
29 traditional design-bid-build process.

30 (B) "Best value" means a value determined by objective criteria
31 that may include, but is not limited to, price, features, functions,
32 life cycle costs, experience, and other criteria deemed appropriate
33 by the department.

34 (d) The Legislature recognizes that the design-build entity is
35 charged with performing both design and construction. Because
36 a design-build contract may be awarded prior to the completion
37 of the design, it is often impracticable for the design-build entity
38 to list all subcontractors at the time of the award. As a result, the
39 subcontractor listing requirements contained in Chapter 4
40 (commencing with Section 4100) of Part 1 of Division 2 of the

1 Public Contract Code can create a conflict with the implementation
2 of the design-build process by requiring all subcontractors to be
3 listed at a time when a sufficient set of plans may not be available.
4 It is the intent of the Legislature to establish a clear process for
5 the selection and award of subcontracts entered into pursuant to
6 this section in a manner that retains protection for subcontractors
7 while enabling design-build projects to be administered in an
8 efficient fashion. Therefore, all of the following requirements shall
9 apply to subcontractors, licensed pursuant to Chapter 9
10 (commencing with Section 7000) of Division 3 of the Business
11 and Professions Code, that are employed on design-build projects
12 undertaken pursuant to this section:

13 (1) The department, in each design-build solicitation package,
14 may identify types of subcontractors, by subcontractor license
15 classification, that will be listed by the design-build entity at the
16 time of the bid. In selecting the subcontractors that will be listed
17 by the design-build entity, the department shall limit the
18 identification to only those license classifications deemed essential
19 for proper completion of the project. In no event, however, may
20 the department specify more than five licensed subcontractor
21 classifications. In addition, at its discretion, the design-build entity
22 may list an additional two subcontractors, identified by
23 subcontractor license classification, that will perform design or
24 construction work, or both, on the project. In no event shall the
25 design-build entity list at the time of bid a total amount of
26 subcontractors that will perform design or construction work, or
27 both, in a total of more than seven subcontractor license
28 classifications on a project. All subcontractors that are listed at the
29 time of bid shall be afforded all of the protection contained in
30 Chapter 4 (commencing with Section 4100) of Part 1 of Division
31 2 of the Public Contract Code. All subcontracts that were not listed
32 by the design-build entity at the time of bid shall be awarded in
33 accordance with paragraph (2).

34 (2) All subcontracts that were not to be performed by the
35 design-build entity in accordance with paragraph (1) shall be
36 competitively bid and awarded by the design-build entity, in
37 accordance with the design-build process set forth by the
38 department in the design-build solicitation package. The
39 design-build entity shall do all of the following:

1 (A) Provide public notice of the availability of work to be
2 subcontracted in accordance with Section 10140 of the Public
3 Contract Code.

4 (B) Provide a fixed date and time on which the subcontracted
5 work will be awarded in accordance with Section 10141 of the
6 Public Contract Code.

7 (C) As authorized by the department, establish reasonable
8 prequalification criteria and standards, limited in scope to those
9 detailed in paragraph (2) of subdivision (c).

10 (D) Provide that the subcontracted work shall be awarded to
11 the lowest responsible bidder.

12 (e) This section shall not be construed and is not intended to
13 extend or limit the authority specified in Section 19130.

14 (f) Any design-build entity that is selected to design and
15 construct a project pursuant to this section shall possess or obtain
16 sufficient bonding consistent with applicable provisions of the
17 Public Contract Code. Nothing in this section shall prohibit a
18 general or engineering contractor from being designated the lead
19 entity on a design-build entity for the purposes of purchasing
20 necessary bonding to cover the activities of the design-build entity.

21 (g) Any payment or performance bond written for the purposes
22 of this section shall use a bond form developed by the department.
23 In developing the bond form, the department shall consult with
24 the surety industry to achieve a bond form that is consistent with
25 surety industry standards, while protecting the interests of the state.

26 (h) The department shall submit to the Joint Legislative Budget
27 Committee, on or before January 1, 2015, a report containing a
28 description of each public works project procured through the
29 design-build process that is completed after January 1, 2010, and
30 before December 1, 2014. The report shall include, but not be
31 limited to, all of the following information:

- 32 (1) The type of project.
33 (2) The gross square footage of the project.
34 (3) The design-build entity that was awarded the project.
35 (4) The estimated and actual project costs.
36 (5) An assessment of the prequalification process and criteria.
37 (6) An assessment of the effect of retaining 5 percent retention
38 on the project.

39 (7) A description of the method used to award the contract. If
40 the best value method was used, the report shall describe the factors

1 used to evaluate the bid, including the weighting of each factor
2 and an assessment of the effectiveness of the methodology.

3 (i) (1) *The requirement for submitting a report imposed under*
4 *subdivision (h) is inoperative on January 1, 2019, pursuant to*
5 *Section 10231.5 of the Government Code.*

6 (2) *A report submitted pursuant to subdivision (h) shall be*
7 *submitted in compliance with Section 9795 of the Government*
8 *Code.*

9 ~~SEC. 2. Section 4 of Chapter 252 of the Statutes of 1998 is~~
10 ~~repealed.~~

11 *SEC. 2. Section 4 of Chapter 252 of the Statutes of 1998, as*
12 *amended by Section 3 of Chapter 154 of the Statutes of 2007, is*
13 *repealed.*

14 ~~Sec. 4. The Director of General Services may enter into only~~
15 ~~seven design-build contracts pursuant to Sections 2 and 3 of this~~
16 ~~act. Two of these seven contracts shall be for the new veterans'~~
17 ~~homes in Fresno and Shasta Counties. Effective July 1, 2009, the~~
18 ~~provisions of Sections 2 and 3 of this act shall only remain~~
19 ~~operative for the seven design-build projects specified in this~~
20 ~~section.~~

21 *SEC. 3. This act is not intended to void or terminate*
22 *design-build contracts already executed by the Department of*
23 *General Services prior to the effective date of this act, including,*
24 *but not limited to, the new veterans' homes in Fresno and Shasta*
25 *counties.*